90-1587

No. _____

Supreme Court, U.S.
FILED
APR 12 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CAPELETTI BROS., INC., et al.,

Petitioners,

v.

BROWARD COUNTY, FLORIDA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do construction contractors, at whom a County's race-conscious bid specifications and "goals" are aimed and who must comply with those requirements, lack standing to challenge the constitutionality of such race-conscious requirements when compliance with the County's requirements (1) limits the exercise of their business judgment to select subcontractors and suppliers, (2) increases their costs and risks, (3) decreases their profits, (4) limits their freedom to choose the subcontractors they believe could best complete the work, (5) puts in jeopardy the quality of work and the contractor's reputation, and (6) decreases the opportunities for them to subcontract and supply materials to other non-minority-owned contractors?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Capeletti Bros., Inc.; Weekley Asphalt Paving, Inc.; Westwind Contracting, Inc.; and Hardrives Company
Respondents:	Broward County, Florida; and L.A. Hester

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OPINIONS BELOW

The district court opinion is reported at 738 F.Supp. 1415 (S.D.Fla., 1990) and is reproduced in the appendix to this petition at App.2. The Court of Appeals' summary affirmance is unreported and is reproduced in the appendix at App.1.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on April 2, 1991, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions

Article III, § 2, Constitution of the United States:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . . under their authority. . . .

Amendment XIV, Constitution of the United States:

Section 1. Citizens of the United States.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

a. 42 U.S.C. § 2000d. Nondiscrimination in federally assisted programs

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

b. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners are four non-minority-owned construction firms which sued to have declared unconstitutional Broward County's use of racial, ethnic, and sexual criteria in its construction contracts and bid specifications and its use of "goals" for minority-owned firm participation in public construction contracting. The district court dismissed the case on the pleadings. It held that these contractors, at whom the County's program is aimed, upon

whom the effects of the program fall, and who must comply with the program's race-conscious requirements, lacked standing. The Court of Appeals summarily affirmed on the authority of *Cone Corporation v. Florida DOT*, 921 F.2d 1190 (11th Cir., 1991), *cert.* petition pending, case number 90-1535 (1991).

The verified complaint alleged that, in awarding contracts for public construction contracting, Broward County used suspect categories (race and ethnicity) without having any "compelling interest" in doing so, used sexual categories without it serving any properly remedial purpose (*i.e.*, not being either rationally or "closely" related to the achievement of any proper or "important" purpose), and that, even if the County could demonstrate any such interest, it had failed to tailor its "remedy" narrowly.

With regard to the effect on the petitioners, the verified complaint alleged that each of the plaintiffs "bids as a prime contractor on projects let by Broward County, and it intends to bid on such projects in the future." It further alleged that each of them "also bids as a subcontractor and supplier to other companies which bid as prime contractors on construction projects let by Broward County." *See*, Complaint, paragraphs 3 through 6. The complaint went on to allege:

VI.

EFFECT ON THE PLAINTIFFS; IRREPARABLE HARM

48. Plaintiffs have in the past, currently do and will in the future seek to perform work in the construction industry for Broward County.

49. Plaintiffs have been injured in their business or property as the result of the MBE utilization requirements currently being enforced by Broward County in the award of construction contracts.

50. The MBE utilization requirements imposed by Broward County limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs and risks, decrease its profits, limit its freedom to choose the subcontractor it believes could best complete the work and put in jeopardy the quality of work and the contractor's reputation.

51. The MBE utilization requirements imposed by Broward County decrease the opportunities for non-MBE subcontractors and materials suppliers to participate on contracts let by the county.

52. Non-MBE general contractors and subcontractors, including the plaintiffs, bear a disproportionate share of the burden imposed by Broward County's MBE set-aside programs in the construction industry.

53. Unless this Court enjoins the unlawful and unconstitutional conduct of Broward County, plaintiffs will, in the future, be injured in their business or property in ways which are difficult or impossible to quantify in money and which are difficult or impossible to remedy.

54. Plaintiffs have no adequate remedy at law to prevent future unconstitutional discrimination by Broward County in the awarding of construction contracts.

The district court found these allegations insufficient to confer upon these contractors standing to attack the County's use in the bidding process of racial, ethnic and sexual criteria. The court acknowledged that the complaint alleged that "the plaintiffs, as contractors and subcontractors, are losing money because they have to follow Broward County's requirements in bidding on public construction projects." It determined, however, that this *could not be true* because "[i]t would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program. . . . ".

The district court also held that these contractors lacked standing because there was insufficient "individualized" injury alleged:

> All the contractors and subcontractors who wish to bid on public projects in Broward County must adhere to the requirements of the set-aside program. . . . Therefore, even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirement.

Finally, the district court noted (correctly) that the petitioners had not alleged that they had ever lost a contract because of the County's race-based requirements and pointed out that the contractor which prevailed in *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706 (1989), had, in fact, lost a contract and therefore had standing. The district court concluded by stating:

> Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. . . . Under Article III § 2 of the Constitution, this court can only decide cases and controversies. This lawsuit, under the allegations in the plaintiff's complaint, does not satisfy this requirement.

The Court of Appeals summarily affirmed and this petition followed.

ARGUMENT – REASONS FOR ALLOWANCE OF THE WRIT

The district court's analysis of the Article III "standing" requirement limits the universe of potential plaintiffs who may challenge various "disadvantaged enterprise programs" to those contractors who have, because they did not comply with the race-, ethnic-, and sex-conscious requirements imposed by such a program, failed to win a contract on which they were the low bidders. This is unduly restrictive, is unrealistic, is in conflict with the decisions of this Court, of other Courts of Appeals, and of district courts in other Circuits, and serves to distort the law of standing in very undesirable ways.[1] *Certiorari* should be granted to correct this radical

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[1] It should be noted that, in arriving at its conclusion that the petitioners lacked standing, the district court made findings of fact contrary to the allegations contained in the verified complaint and contrary to the evidence in the record. Fact-finding is not a proper function of a court when determining a

(Continued on following page)

departure from two centuries of precedent and to resolve the conflict between the Eleventh Circuit's approach to standing in cases of this nature and that taken by other courts (including this Court).

1. Petitioners have sufficiently alleged their standing

The decision rendered by the district court and summarily affirmed by the Court of Appeals improperly restricts standing to challenge racial discrimination in public contracting only to those who can demonstrate that they have suffered economic injury through the loss of a contract on which they were the low bidder and which was denied them because they failed to conform to the unconstitutional requirements imposed. *Certiorari* should be granted to make clear that all those who are directly affected by the use of unconstitutional race-conscious bid specifications and "goals", such as the petitioners in this case, (and not only disappointed low bidders) have standing to challenge such governmental programs.

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motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P. If the court's analysis of the "standing" requirement was erroneous, as petitioners believe that it was, then there *was* sufficient evidence in the record to deny the motion to dismiss. The complaint was verified and the sworn testimony of the principals of two of the plaintiffs (as to the effects that programs of this sort have on their companies) was submitted to the court and is part of the record. This is sufficient if the petitioners' view of what is required to confer standing is adopted.

The standing and ripeness doctrines arise, in large part, out of consideration of the limitation on the judicial power contained in Article III of the Constitution. This determination – of whether what a court is being asked to do is to decide a "case or controversy" – must be made on a case-by-case basis. The doctrine was never intended to be used (and petitioners are unable to find any decision of this Court in which it has been used) to deny the right to sue to a party at whom a challenged government-imposed requirement is aimed and who must comply with that challenged requirement, to its detriment, in order to remain in business.

The determination of whether a party has standing in a particular case is usually made by evaluating several overlapping and interrelated considerations, some of which are prudential and some of which are constitutionally required. None of these considerations either requires or should have resulted in a dismissal in this case.

Stated most basically, for there to be a "case" within the meaning of Article III there must be a "real" issue presented for judicial resolution (and not one that is merely abstract, hypothetical or contingent, *i.e*, a request for an advisory opinion). There *is* such a "case" in this litigation.

Courts of the United States do not, of course, give advisory opinions. This is a basic tenet. Advisory opinions are necessarily hypothetical and, therefore, do not present a "case" which is ripe for adjudication. In such a situation there are no adverse parties, the "facts" are

fiction (by stipulation or presumption) and require speculation (because they may never exist) and the injury (if any) has not occurred and is not immediately threatened. These sorts of cases are not decided by the courts of the United States and with this proposition petitioners do not quarrel.

Given this necessary aversion to deciding controversies which are presented in hypothetical circumstances, standing to contest unconstitutional governmental action necessitates a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution." *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-52 (1970). In this case the parties are clearly adverse; the manner in which the County's race-conscious program is enforced is not hypothetical or speculative (since it has been operating for some period of time); the petitioners have been complying, to their detriment, with the unconstitutional requirements imposed by the County; they will, in the future, have to continue to comply if (as alleged) they desire to engage in public construction contracting in Broward County; the controversy is presented in a form capable of judicial resolution; and the courts of the United States have the power to grant relief which will alleviate the harms of which petitioners complain.

To assure that courts do not give advisory opinions, and to insure that they exercise only the power described in Article III, the courts subject constitutional challenges to examination in several ways. None of the tests is absolute, however, and the determination of whether a particular lawsuit falls within the Article III parameters

necessarily involves the application of informed judicial discretion. As Justice Frankfurter said:

> The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a "case or controversy".
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1951)

Although the precise outer limit of the "standing" doctrine may not be marked with a bright line, this case presents circumstances well within the established boundaries and which, most lawyers would feel, would "constitute a 'case or controversy' ". *Certiorari* should be granted to insure that the standards for standing applied to non-minorities who sue to enforce constitutional civil rights guarantees are the same as those applied to minority plaintiffs who do the same.

First, to fit within the judicial power as defined by Article III, the issues presented must be "ripe" for judicial resolution. This, in essence, seeks an answer to the question: "Can the court be reasonably certain that it is deciding a concrete issue based on concrete facts?" (*i.e.*, has the controversy matured to a point where the facts won't change to avoid or eliminate the need for judicial intervention and has the injury occurred [or is it imminent]?) The answer, in this case, is "yes". Broward County's use of race-conscious criteria has been enforced for some time, continues to be enforced, and will be enforced in the future. The manner in which it operates and affects these petitioners is not a matter for conjecture and there

is no indication that the unconstitutional discrimination it commands will cease absent judicial intervention.

Second, the case must not turn on moot questions. If a case is moot, there is nothing upon which the decision may operate. The "case" has been resolved and judicial action will not afford the plaintiff any relief.[2] As noted, this case is far from moot; the County continues to impose its race-conscious requirements on the petitioners.

Third, there must be adverse litigants. *See, e.g., Muskrat v. United States*, 219 U.S. 346 (1911).[3] Here there is no question but that this is no "friendly suit"; the litigants are truly adverse.

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[2] To even this rule, however, there is an exception: if the action challenged is "capable of repetition, yet evading review". Thus, this must be a prudential, not a constitutional, consideration.

[3] In *Muskrat*, the Court struck down the portion of a statute which authorized a test suit to determine the validity of a statute allocating Indian lands. In that case, the attorneys for both sides were to be paid by tribal funds deposited in the Treasury. No dispute between the parties existed as to title to the land, nor did the parties dispute the constitutionality of the statute, but they merely wanted a judicial confirmation of the constitutionality of the substantive provisions of the statute. This was held to be outside the judicial power of the Court. When an actual controversy later arose concerning the substantive aspects of the legislation, and the Indians sued to enjoin the Secretary of the Interior from enforcing the statute, they obtained a decision on the merits, *Gritts v. Fisher*, 224 U.S. 640 (1912).

Fourth, and related to the requirement of "adverseness", the suit must not be collusive or feigned.[4] There is, however, nothing collusive or feigned about this suit; it is brought by entities which are being forced to comply with unconstitutional governmental requirements imposed by the County and which the County is defending vigorously.

Fifth, the injury complained of must either have actually occurred, *United Public Workers v. Mitchell*, 330 U.S. 75

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[4] *See, e.g., Lord v. Veasie*, 8 How. (49 U.S.) 251 (1850). The proper dichotomy was succinctly described by this Court in *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892):

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.
>
> *Id.*, 143 U.S. at 145

But compare, e.g., Hylton v. United States, 3 Dall. 171 (1796); *Fletcher v. Peck*, 6 Cr. (10 U.S.) 87 (1810); *Scott v. Sanford*, 19 How. (60 U.S.) 393 (1857); and *Powell v. Texas*, 392 U.S. 514 (1968) (all actions resulting in constitutional decisions in which friendly parties contrived to bring the suit and in which the suits were supervised and financed by one side).

(1947), or the injury must be likely to occur. *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

Warth required that there must exist a "substantial probability" that, absent the challenged restriction, the plaintiff would have not suffered the harms alleged and that, "if the court affords the relief requested, the asserted [injury to] petitioners will be removed." *Id.*, 422 U.S. at 504. The requirement was not satisfied in *Warth* because no plaintiff owned property in the city, "none is himself subject to the ordinance's strictures; and none has even been denied a variance or permit by respondent officials", *ibid.*, and they did not allege or show that, if those directly affected (builders) had been permitted to build the housing, those projects "would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. . . . In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." *Id.*, 422 U.S. at 506.

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.[18]

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[18] This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in

> various ways, which we need not undertake to identify in the abstract. . . .

Id., 422 U.S. at 508

In *Arlington Heights*, however, an individual who alleged that he would apply to live in the low-income housing project which would be built if the zoning were changed was held to have standing to contest the allegedly racially-discriminatory determination not to rezone a parcel of land, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977).[5]

The petitioners in this case are affected far more directly, far more immediately and far more concretely than the plaintiffs in either *Warth* or *Arlington Heights* were. As noted by Mr. Capeletti in his sworn testimony in the case of *Capeletti Brothers v. Dade County*[6], when a contractor has to subcontract out work to a minority contractor, which is work that the contractor would normally perform himself, the contractor faces substantial risk because it is ordinarily the one responsible for the performance bond. In addition, if the contractor is forced to subcontract out the controlling item of work, the contractor may face delays or other problems which it cannot

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[5] Standing was found although it was necessary to indulge four "if"s, an inference and a prediction: *i.e., if* the zoning were found to be racially discriminatory (the issue being litigated) and *if* it were changed as MHDC requested and *if* MHDC built the project then *if* Ransom [the individual plaintiff] applied it *appeared* that he would qualify and he *alleged* he would move in.

[6] This testimony was made part of the record in this case. See, "Transcript of Proceedings", included in docket number 32, p.21.

control, but which then affect that contractor's ability to complete its own work. Moreover, the contractor obviously fails to reap his expected profit on items it is required to subcontract to others. These petitioners should have standing to challenge the County's program.

Sixth, the injury must be of a type which can be alleviated by judicial action.[7] The injury need not be economic to confer standing,[8] and – whether economic or not – it can be very small and still afford standing.[9] These

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[7] Certainly, if a court cannot fashion relief effectively to prevent or remedy the harm claimed, there cannot be a "case or controversy" which is properly justiciable.

[8] *Arlington Heights*, 429 U.S. at 262-3:

> Petitioners' argument also misconceives our standing requirements. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. *United States v. SCRAP*, supra, 412 U.S., at 686-687, 93 S.Ct., at 2415; *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *Data Processing Service v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club v. Morton*, supra, 405 U.S., at 739, 92 S.Ct., at 1368.

[9] Injury in fact . . . serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, see *Baker v. Carr*,

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petitioners clearly have more than a "mere abstract concern about a problem of general interest", *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). The unconstitutional requirements are directed at these petitioners, it is they who are being forced to comply with those unconstitutional requirements and it is they who are absorbing a significant cost and losing work[10] for having to do so.

Seventh, the plaintiff must not be suing solely in his capacity as a "taxpayer". If standing is sought solely on the status of a plaintiff as a "taxpayer", there can, by definition, be no individualized injury, since the harm alleged is necessarily rooted in the *expenditure* of revenue (rather than the raising of it), so there is no "harm" suffered from any *payment* of taxes which judicial intervention will alleviate, and if the only effect which can be alleged by the plaintiff is his "taxpayer" status, it is unlikely that he is suffering any more direct effect from the challenged activity.

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389 U.S. 186, a $5 fine and costs, see *McGowan v. Maryland*, 366 U.S. 420, and a $1.50 poll tax, *Harper v. Virginia Bd. of Education*, 383 U.S. 663.

United States v. SCRAP, 412 U.S. 669 (1973).

[10] The district court decision ignores the effect on these petitioners from having to subcontract out to others, in order to meet race-conscious subcontracting "goals", work which they would otherwise complete with their own work force and equipment. This has both economic effects (*e.g.*, reduced profits and increased costs) and intangible effects (the non-quantifiable but real effect on the rate of growth of the petitioners' businesses).

Here the petitioners do *not* allege that their standing is based on any objection to the way in which the County is either collecting or expending funds but, rather, on the effects the County's actions have on them. The mere fact that *other* contractors share the burden of the County's racially discriminatory requirements and suffer similar injury does not deprive *these* petitioners of standing. If *that* were a proper application of the standing doctrine, then *no* one would have standing to challenge *any* widespread governmental discrimination because they would be suffering no injury unique to them but only the injury suffered by all of their race or group. The district court opinion expanded and distorted the "individualized injury" requirement beyond recognition and should be reversed.

Eighth, the litigant must be asserting a harm to his own rights or to those of another which directly affects his own rights. Compare *Warth v. Seldin*, 422 U.S. 490 (1975) with *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The basic rule is that rights of others may be asserted if there is a direct, derivative effect on the plaintiff or if the right is being asserted in a representative capacity. In this case, plaintiffs are asserting their own rights – that they should be free to choose subcontractors and suppliers without regard to race; they have also asserted that, since they also function as subcontractors and suppliers, they have a right to bid and to be chosen without regard to race and that the denial of that right directly affects them.[11]

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[11] At least one other aspect of determining whether there is a justiciable claim presented is the "political question"

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Finally,

> Standing to contest unconstitutional governmental action necessitates a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and *in a form historically viewed as capable of judicial resolution.*"
>
> *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-52 (1970) (emphasis supplied).

These petitioners have certainly alleged that they have "sustained or will sustain an injury" and they clearly have been "moved to present the issue 'in an adversary context and in a form historically viewed as capable of judicial resolution.' " A declaration as requested (and an injunction requiring judicial review before imposition of any other race-, ethnic- and sex-conscious program) will alleviate the actual and threatened harms complained of by the plaintiffs.

Since the issues on the merits of this litigation are (1) whether the County has a "compelling interest" in utilizing race-conscious bid specifications and "goals"[12] and (2) if so, whether the County's remedy has been "narrowly tailored" to the identified discriminatory practices or effects sought to be eliminated, the precise harm

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doctrine. This aspect of the "case or controversy" doctrine is not implicated in this litigation.

[12] *I.e.*, whether the County has facts with which it can identify discriminatory practices or effects that it supposedly now seeks to remedy through the use of these race-conscious bid specifications and "goals".

caused is not so significant as the fact that the program has had *some* actual effect on these petitioners. Standing to obtain an adjudication of the constitutionality of the County's race-conscious program does not depend on *how* the plaintiffs have been injured, but upon the fact that they are directly affected by the program's race-conscious bid specifications and "goal" requirements.

2. The Court of Appeals decision conflicts with decisions in other Circuits

The decision rendered by the district court and summarily affirmed by the Court of Appeals conflicts not only with two centuries of precedent in this Court, but with a number of recent decisions of courts in other Circuits which have considered the "standing" issue in the context of challenges to minority "set-aside" enactments. *Certiorari* should be granted to resolve this conflict and to make explicit the proper standard to be used in cases such as this.

The Court of Appeals has earlier cited to the district court decision in this case with approval and has acknowledged that the position it has taken on the standing requirement (and the position taken by the district court in this case) is in conflict with decisions rendered by at least three other courts in two other Circuits:

> The contractor is not actually injured by these increased costs because it simply includes them in its bid and passes the cost on to the FDOT. *See Capeletti Bros. [v. Broward County,* 738 F.Supp. at 1417 (stating that "[i]t would be the irrational businessman who did not factor such costs into his bid. . . . [I]t is the [governmental entity] who

> ultimately absorbs the costs of its program by paying more to complete public construction projects"). Even if the contractor does not always include the increased cost in its bid, as the plaintiffs' evidence seems to indicate, the resulting smaller profits are a problem common to all contractors. *See id.* ("even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders"). *But see Contractors Ass'n [v. Philadelphia]*, 735 F.Supp. [1274] at 1283-1284 n.3 [(E.D.Pa., 1990)] (finding standing for an association of contractors who alleged, *inter alia*, that the expenses of one contractor member on a specific contract were higher because of the MBE requirements); *Rhode Island Chapter, Associated Gen. Contractors v. Kreps*, 450 F.Supp. 338, 346-7 n.3 (D.R.I. 1978) ("even the successful bidder reduces his profit by having to subcontract work he could have performed himself"); *Constructors Ass'n v. Kreps*, 441 F.Supp. 936, 945-46 (W.D.Pa. 1977).
>
> *Cone Corporation v. Florida DOT*, 921 F.2d 1190, 1210 fn.57 (11th Cir., 1991), *cert.* petition pending, case number 90-1535.

The decisions in *Contractors Ass'n v. Philadelphia*, 735 F.Supp. 1274 (E.D.Pa., 1990), *Rhode Island Chapter, Associated Gen. Contractors v. Kreps*, 450 F.Supp. 338 (D.R.I. 1978), and *Constructors Ass'n v. Kreps*, 441 F.Supp. 936 (W.D.Pa. 1977), were all rendered in conformity with the law of standing as articulated by the First and Third Circuits[13], reflect the more traditional analysis of

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[13] *See also, e.g., Michigan Road Builders v. Milliken*, 834 F.2d 583 (6th Cir., 1987), *aff'd*, 109 S.Ct. 1333 (1989), reaching the

(Continued on following page)

standing, and are in conflict with the law as articulated by the Eleventh Circuit in *Cone Corporation* and in this case.

In light of the large number of cases now pending which challenge the use by various governmental entities of race-conscious bid specifications and "goals" and the paucity of plaintiffs and potential plaintiffs who have been denied contracts because of a failure to comply with any program's requirements,[14] it is important for this Court to grant *certiorari*. This Court should reverse the

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(Continued from previous page)

merits of the constitutional question but necessarily assuming, *sub silentio*, the existence of a "case" or "controversy". The Court of Appeals for the Seventh Circuit also recently reached the merits of a case where the contractor-plaintiffs alleged effects similar to those which the Eleventh Circuit has now decreed are insufficient to confer standing. *See, Milwaukee County Pavers Ass'n v. Feidler*, 922 F.2d 419 (7th Cir., 1991).

[14] Most contractors, of course, make every effort to comply with the various race-conscious requirements, even if they are unconstitutional, because they are unwilling to risk losing the contract. Thus it will be the exception, rather than the rule, to find a contractor who is the low bidder but whose bid fails to comply with the minority utilization requirements.

Even with such efforts, however, a contractor may fail to comply with the program's requirements and lose a contract. *See, e.g., Cone Corporation v. FDOT*, 921 F.2d at 1206, fn.50 ("Cone alleged, in his deposition, that his company had lost a specific contract on which it had been the low bidder because it failed to meet the DBE goal for the contract.") and the identification of that specific contract at page 10, fn.10, of the pending petition for *certiorari* filed in that case.

Court of Appeals' decision so that the doctrine of standing will not be transformed into an insurmountable hurdle barring relief to those who are most directly affected by these unconstitutional, but politically popular, programs.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

1. Order of the Court of Appeals for the Eleventh Circuit, April 2, 1991.....App. 1

2. Order of the District Court, June 28, 1990... App. 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5725
Non-Argument Calendar

D.C. Docket No. 90-6204-CIV-JAG

CAPELETTI BROTHERS, INC.,
WEEKLEY ASPHALT PAVING, INC.,
WESTWIND CONTRACTING, INC.,
and HARDRIVES COMPANY,

Plaintiffs-Appellants,

versus

BROWARD COUNTY and L. A.
HESTER, the administrator of
Broward County,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 2, 1991)

Before HATCHETT, CLARK and COX, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir. 1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CAPELETTI BROTHERS, INC.; WEEKLEY ASPHALT PAVING, INC.; WESTWIND CONTRACTING, INC.; and HARDRIVES COMPANY;

Plaintiffs,

v.

BROWARD COUNTY and L.A. HESTER,

Defendants.

Case no. 90-6204-CIV-JAG

ORDER

THIS CAUSE has come before the court upon the motion of the defendants to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(B)(6). The plaintiffs have filed an opposing response and the defendants replied. The court has also heard oral argument of able counsel at the hearing held on May 11, 1990.

The plaintiffs are general and subcontractors who have an intend in the future to bid on building projects let by Broward County, Florida. The contractors challenge the legality of the County's set-aside program under the Equal Protection guaranty of the Fourteenth Amendment to the U.S. Constitution. Effective in 1985, Broward County adopted a program to aid minority contractors

entitled Small Disadvantaged Business Enterprise Affirmative Action Program(the program or set-aside program). The program applies to "small, disadvantaged business enterprises", which are defined as businesses owned and operated by one or more of the following categories of individuals: Black Americans, Hispanic Americans, Asian-Pacific Americans, Native Americans, Asian-Indian Americans, women, and other persons found to be "socially and economically disadvantaged". See Broward County, Fla., Code §20-275(2).

This court need not reach the merits of the plaintiffs' constitutional challenge because there is a lack of standing, ripeness, and a case and controversy. As noted by the Supreme Court in *Warth v. Seldin*, 422 U.S. 490, 498(1975), these are "threshold questions in every federal case, determining the power of the court to entertain the suit." Because there is also no indication that the plaintiffs can amend their pleading to cure the deficiencies, leave to amend shall not be granted and this case shall be dismissed. In making this determination, the court is mindful that the plaintiffs' allegations in the complaint must be taken as true. Also, any reasonable inferences which can be drawn from the allegations must be construed in favor of the plaintiffs. Nonetheless, it is the plaintiffs' pleading burden to allege sufficient facts in the complaint to allow the court to determine these threshold matters.

In addition, the plaintiffs' challenge cannot be sustained as a facial constitutional attack. The set-aside program is not mandatory, but rather a set of guidelines applied by the county to specific projects. In the program's general statement, it is noted that the county is to use "annual goals", rather than a required minimum

amount of minority business enterprises in public projects. Broward County, Florida, Code §20-275. More explicitly, section 20-276(1) states: "Goals for participation of small, disadvantaged business enterprises in county contracts shall be benchmarks for achievement, not mandates for complete attainment." *Also see* Code §20277(1)(set-aside's defined as applicable to "particular" contracts). Therefore, the issue is whether the county's program, as applied, is unconstitutional and whether it meets the threshold requirements of a justiciable controversy.

First, the plaintiffs lack standing to object to the county's program because they lack an injury-in-fact. The complaint states, in paragraphs 50 through 52, that the set-aside program limits their business judgment, increases costs and risks, decreases profits, decreases business opportunities, and "limit[s] . . . freedom to choose the subcontractor [who] . . . could best complete the work and put in jeopardy the quality of work and the contractor's reputation." These allegations all address economic injury; in other words, the plaintiffs, as contractors and subcontractors, are losing money because they have to follow Broward County's requirements in bidding on public construction projects. However, on its face, the complaint is deficient. Accepting as true that the set-aside program increases costs, there is no injury to the bidders or their profits. It would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program by paying more to complete public construction projects. In effect, then, the plaintiffs only are objecting to the program on the basis of their status as

taxpayers. There has, however, been no showing that the plaintiffs fit within any exception to the general rule that there is no independent ground to challenge government conduct merely on the basis of one's status as a tax paying citizen.

Second, even if there is an injury-in-fact, it is not individualized. All the contractors and subcontractors who wish to bid on public projects in Broward County must adhere to the requirements of the set-aside program, unless the guidclines are waived upon appropriate application. Therefore, even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirement.

Furthermore, the plaintiffs have failed to specify any particular project, which caused them harm. There is no allegation that they submitted a nonconforming bid that was rejected, that they lost any bids, that the program precluded them from submitting a bid, or that they applied for a waiver under the statutory scheme which was refused by the county. There might be a different result if the plaintiffs had lost a bid, where they had the lowest bid, but could not comply with the requirements of minority participation. Moreover, if they had got the bid, but then applied for a waiver because the minority businessman was unable to perform and the county refused to waive the program requirements, then this court might have a case and controversy.

The lack of specific projects is also important to the element of ripeness. As the plaintiffs agree, each public construction project in Broward County is funded by a variety of federal, state, and local monies. The difficulty in judging the constitutional validity of the defendant's program is that there are varying standards, depending upon whether federal or state and local monies are involved. As noted in *City of Richmond v. Cronson*, ___ U.S. ___, 1209 S.Ct. 706, 726-27(1989), the federal government may utilize broader means to combat discrimination without running afoul of the Equal Protection Clause. In its complaint, the plaintiffs focus upon the county's program, without any reliance upon any particular project.

The plaintiffs understandable rely upon the *Cronson* decision. On the merits, the case is certainly supportive of the plaintiffs' position. However, that case reached the Supreme Court in a very different posture than this litigation. In *Cronson*, the city of Richmond, Virginia invited bids for provision and installation of plumbing fixtures at the city's jail. A contractor decided to submit a bid, but he could only comply with the city's set-aside program if he could obtain a minority business to supply the fixtures. However, no minority business enterprises were interested in the project. Cronson submitted his bid and he was the only bidder on the project. Subsequent to the opening of the bids, Cronson still was not able to secure minority participation and he therefore, applied for a waiver of the set-aside requirements from the city. A minority business finally agreed to provide the fixtures for the project, but it would cost Cronson extra monies which he had not factored into his bid. Therefore, he also applied to the city to increase the price of the bid to

reflect these extra costs. The city denied both this application and the waiver request and, when Cronson was not able to find another minority supplier, decided to rebid the project.

In *Cronson*, but for the requirements of the set-aside program, the contractor would have obtained the job. *In this case, the complaint does not allege that they have ever lost a single project because of Broward County's requirements.* Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned, in effect, to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. Especially when a case presents an issue of constitutional law, the court will decline to cull the statute books when no specific factual situation is presented. Under Article III §2 of the Constitution, this court can only decide cases and controversies. This lawsuit, under the allegations in the plaintiff's complaint, does not satisfy this requirement.

Therefore, having considered the motions and the record in this cause, it is hereby

ORDERED AND ADJUDGED that the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED**. The plaintiffs have no standing in this lawsuit and their dispute is not ripe or a case and controversy. For the reasons stated above, leave to amend shall not be granted and the complaint shall be **DISMISSED**.

The plaintiffs' motion for a preliminary injunction is hereby **DENIED**.

The defendants' motion for a protective order is hereby **DENIED**. The pendency of a Rule 12 motion is not a valid basis for barring discovery prior to a decision of the court. Such a matter is an issue addressed to the pleadings, even though it can, as a practical matter such as here, terminate the lawsuit.

DONE AND ORDERED this 28th day of June, 1990.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES
DISTRICT JUDGE

CC: Henry Latimer
Charles Caulkins
Herbert Schlanger